UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	
		Docket #16cv3499
GUZMAN, et al.,	:	1:16cv03499-GBD-RLE
Plaintiffs,	:	
- against -	:	
MEL S. HARRIS & ASSOCIATES, LLC,	:	New York, New York November 9, 2016
Defendants.	:	

PROCEEDINGS BEFORE
THE HONORABLE RONALD L. ELLIS,
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

APPEARANCES:

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Witness	Direct	Cross	Re-Direct	Re-Cross
None				

E X H I B I T S

Exhibit Number	Description	ID	In	Voir Dire
None				

THE CLERK: We're here in the matter for a status conference, Jose Guzman and parties versus LR Credit 13, LLC and parties, 16cv3499. Attorneys, please state your name for the record.

MR. AHMAD KESHAVARZ: Ahmad Keshavarz, Law Office of Ahmad Keshavarz for plaintiff. Good morning, Your Honor.

HONORABLE RONALD L. ELLIS: Good morning.

MR. JEFFREY LICHTMAN: Jeffrey Lichtman and with O'Hare Parnagian representing defendants Samserv, Inc. and William Mlotok.

MR. SCOTT BALBER: Good morning, Your Honor, Scott Balber from Herbert Smith Freehills on behalf of LR Credit 13.

MR. DAVID LEIMBACH: David Leimbach from Herbert Smith Freehills also on behalf of LR Credit 13.

THE COURT: And good morning to everyone. Please be seated. Okay. This case has been referred for discovery disputes. I've gotten the parties' submissions concerning discovery sought by the plaintiff. And let me ask first, there is no discovery scheduled in this case as of yet, is there?

MR. KESHAVARZ: On the bench, but not in writing. The district judge indicated that there would be a close of

discovery, I believe approximately the end of February. It might've been the end of March, but my recollection is the end of February.

MR. LICHTMAN: Jeffrey Lichtman, Your Honor. Mr. Keshavarz is correct, that it is the end of the February, but there was no specific date set, and I don't believe there was an order entered. But that was clearly what was said by Judge Daniels at the last conference.

THE COURT: Okay. It sounds like Judge Daniels wanted to give you the opportunity to see if you could resolve this through settlement. Because having reviewed the file, it doesn't seem to me that this is a case that would have needed that much discovery.

MR. BALBER: I didn't mean to interrupt, Your Honor.

THE COURT: I was finished with that sentence, but.

MR. BALBER: I'll wait. I'm sorry.

THE COURT: No, no, go ahead.

MR. BALBER: I thought you were. I thought you were finished with the thought. I apologize if I interrupted. There's actually a looming issue which may impact the resolution of this case, Your Honor, one way or the other. And I think it's worth mentioning in this

context and it impacts directly the claim for damages and therefore the potential for resolution.

We have advised Mr. Keshavarz that his claims in this case for injunctive relief and for attorney's fees are in direct contravention of Judge Chin's bar order in the Sykes litigation. We have made a written demand that Mr. Keshavarz withdraw those claims and given him a deadline. And if he does not withdraw those claims, we're going to be seeking contempt in front of Judge Chin.

The reason that impacts our discussion today, Your Honor, I think is twofold. One, we did make an offer of judgment in the amount of [REDACTED], which we thought was quite generous even putting aside the attorney's fees issue. And we're disappointed it wasn't accepted.

We do believe that once the attorney's fees claim is out of the case, which we believe they will be, the actual economic damages of the plaintiff in this case are de minimis. I believe it's a couple of weeks of emotional distress with no corroborating medical treatment or anything of that sort. So hopefully, that will result in a resolution.

But either way, for the discovery purposes we're discussing today, the scope of the case and the amount at stake, certainly bears on the question of the

proportionality of the discovery begin sought. And I think Judge Daniels did, as Your Honor noted, recognized that this was not the kind of case that warranted a substantial amount of discovery. And I think that prediction on his behalf proved presient because of this attorney's fees issues that we've now reached.

THE COURT: Okay. Well much of what you said may turn out to be unnecessary to our discussion here today. Although since you did bring it up, I want to caution the parties about talking about such things as offers of judgment. Certainly I wouldn't expect you to discuss that with -- before Judge Daniels because it sort of muddies the waters if you start to talk about settlement offers and, you know, it sort of affects the balance of how the court might view parties. I always suggest that parties not divulge the fact that they've made offers of judgment.

MR. BALBER: Yeah, it was not a settlement offer, Your Honor, it was an offer of judgment. But your point's well taken. Thank you.

THE COURT: Okay. Even without the benefit of however this goes with respect to attorney's fees and the offer of judgment, I think this case, as I indicated, does not seem to be a case that required a large scope of discovery. And therefore, I think that the February date

is more in keeping with the way the case appears. And based upon the submissions, I concur, that is, that take into account what Rule 26 says about the broke proportionality between the discovery sought and the potential benefit for the discovery. Even without the things that were just indicated, it seems to me that the discovery, the broad discovery, sought on the Sykes class action, given the claims that Guzman has here, are disproportionate, particularly given the defendants that are left.

And the likelihood that the proportion of responsibility would probably mirror what happened in the Sykes class action, opening up all the discovery in the Sykes class based upon statements that were made by Judge Chin, which I think don't support the broad idea that it would be necessary for the plaintiff in this case to have all of the discovery in the Sykes case in order to present the plaintiff's case.

I find that the application to get the discovery in the Sykes case is not warranted. The burden of -- is not entirely clear in the applications of the new Rule that the burden necessarily falls on the party that is seeking the discovery. But it does mean that the Court has to be convinced that either from statements by the plaintiff

demonstrating that there is proportionality, or the defendant indicating that there is not proportionality, that the discovery is appropriate. Since the burden outweighs the likely benefit in this case, I find that the discovery sought by the -- the broad discovery, class discovery, sought by the plaintiff, and including the pleadings in the Sykes case is unwarranted, and that application is denied.

MR. KESHAVARZ: May I speak, Your Honor?

THE COURT: Well you can speak, although let me be clear, you speak and the lawyers always want to say something after I've made a ruling. But let me be clear. If I, having gotten a submission from the parties, I'd do one of two things. Either I ask the parties to clarify it by oral discussion or I rule. Having ruled, you may make statements for the record, but don't anticipate it will have a change on the Court's rule.

MR. KESHAVARZ: Thank you, Your Honor. I believe the statements made by opposing are somewhat inaccurate. The initial --

THE COURT: You do understand that I said that was -- his statements had no impact on my decision. And as I said, I come before the parties, I ask them for oral argument or I give them my ruling. But for the record, you

may tell me what's wrong with what counsel said.

MR. KESHAVARZ: Thank you, Your Honor, and it's not in the pleadings today, so I'm not sure if -- this is the issue. You made an issue about proportionality. The question is what's the value of the case. Opposing counsel indicated in their letter that it was two or three weeks of distress. That's not true. It's been emotional distress from the day they garnished until today. Until today, he can't sleep two to three times a week. He's staying up until two in the morning, tossing and turning. For the first year, it was every night.

That wasn't -- the facts weren't elaborated in the original complaint, and thus not in the record before you. But the initially disclosures and the proposed amended complaint flushed out those damages. So in terms of proportionality, the Second Circuit has affirmed garden variety emotional distress of up to $135,00 for damages as disclosed in the initial disclosures.

The second issue in terms of proportionality, we have a GBL349 claim with allows for punitive damages. Punitive damages generally are thought to be up to nine times actual damages. If the actual damages which were upheld by the Second Circuit are up to $135,000, and you can multiply that by up to nine, that is not an

insubstantial case. We may disagree with that value but that's what the case law says. So in terms of proportionality, I would indicate that.

So in terms of what's requested, in terms of unsealing the pleadings in Sykes, there's a confidentiality order, it would still be subject to that confidentiality order that we have in place. I can't see how production of pleadings they already have in their possession, custody and control -- I think it was put on to a CD ROM within ten minutes -- could be disproportionate.

The reason why I need that is for punitive damages under GBL349, I need to show it's a pattern of practice of the defendants. One of the allegations, which is attached to the complaint, is the affirmation of the expert in Sykes by Mr. Egelson (phonetic), if I'm pronouncing it correctly, that documenting multiple times that the same process server claimed to be at the same place at the same time. The defendant in this case, the process server whose been sued and was defaulted, my recollection is that the analysis indicated that he was in the same place at the same time a hundred times.

So that goes to proportionality and that goes to why production of the pleadings would be reasonable. The other reason is that in Judge Chin's order he indicated

that based on the submissions, they found substantial reason to believe that the allegations were true for the purposes of class certification.

THE COURT: That's not an insubstantial qualification. I mean, in class certification you do look at the allegations and see if the likely class is going to meet certain criteria. Whether or not it's going to substantiate the claim, that's why you'd have discovery. Even if you had certified the class, if that class had been certified under Sykes based upon what Judge Chin had said, it wouldn't prove liability. It would just indicate that there's a basis for the class to go forward.

But in addition to that, one of the difficulties here -- you mentioned in a report, for example. While you're doing that now, your initial request was akin to using saturation bonding when what you really are asking for now is a drone strike. And I rule on what's presented to me. Not that I would necessarily agree with whatever this report says, but what you asked for was all the discovery in the case and the pleadings. You didn't say I want this document. In fact, if you wanted a particular document in that litigation, I'm not sure why you'd even be asking me instead of seeking it in the other litigation.

But again, you ask for broad discovery. I said

based -- you looked at one element, that is, one element of the proportionality is the recovery. But the other element of the proportionality is how relevant the information is going to be to what it is that you assert you're trying to get the information for. And you said I need the pleadings, I need all the discovery, without -- you know, again, not to suggest that it necessarily would've been different, but you were doing exploratory surgery when what you needed was a nice scalpel.

But your opponent wants to respond to something that you've already said. Why don't we do that --

MR. KESHAVARZ: Can I finish up with that, or no?

THE COURT: Oh, I thought you were finished.

MR. KESHAVARZ: No, just that they were separate requests. One was for all discovery but a separate requests was just for the pleadings. So there could be a ruling as to one and not the other.

THE COURT: Yes, and I said as to the pleadings and as to the discovery, as to each of those requests, the answer was they were denied.

MR. KESHAVARZ: Thank you, Your Honor.

MR. LICHTMAN: Your Honor, Jeffrey Lichtman --

THE COURT: You do realize at this point you're winning. I just want you to know.

MR. LICHTMAN: I do, Your Honor, and I just understand as well that you've already ruled. I just do want to make sure that it's also clear that we do take issue with the notion that GBL349 allows for punitive damages. We do not believe that's the law. We believe that there is substantial law in New York that says punitive damages are not allowed. There are treble damages that are allowed up to $1,000 and some courts have called that punitive damages, and have said that there are limited punitive damages available under that statute, referring to the treble damages.

So we believe, Your Honor, that as a matter of law that the amount of controversy here, to the extent that it would be subject to some inflation by punitive damages, even if successful, would only add $1,000. And that we believe that because punitive damages are not available, all of the discovery about any other incident, other than this one incident, to the extent that he needs it for punitive damages is simply not relevant to the action because punitive damages are not recoverable.

So we need this as a matter of law, Your Honor, and we appreciate Your Honor's ruling. Thank you.

THE COURT: Anyone else want to weigh in and make a record? Okay. Yes, go ahead.

MR. KESHAVARZ: Aside from the GBL issue, for the FDCPA statutory damages, the elements include a pattern of practice evidence and it can't. The discovery, at least as to the pleadings, would go as to that.

The last thing I would indicate is that in terms of the order of class certification, the way I read the order, and I quoted it in the complaint, was that the Court -- and the language could be read either way. But I think the more proper way to read it was that the Court made the following findings of fact based on the submissions in the pleading. And I have the quote.

The language is somewhat ambiguous, but the section that I'm referring to is in the -- what they actually -- the proposed amended complaint. It's tracked in the complaint itself, in the proposed amended complaint, which is document for 55-1, page 8, item 38. It says the record before the court establishes that the defendants obtain tens of thousands of default judgments of consumer debt actions based on the affidavits attesting to the merits of the action, that were generated on mass by -- and it goes on.

But the language is there. The court -- the record before the court establishes, so it seems --

THE COURT: Establishes?

MR. KESHAVARZ: The facts, establishes, one, that the defendants whose tens of thousands of default actions of consumer debt actions, based on thousands of affidavits attesting to the merits of the action that were generated on mass by a sophisticated computer program, and signed by a law firm employee -- Mr. Fallbacher (phonetic) -- who did not read the vast majority of them, and claimed to, but apparently did not have personal knowledge of the facts to which he was testing.

The record also showed that on hundreds of occasions, the defendant process servers, including the defendant in this case -- John Andino -- purported to serve process at two or more locations at the same time. As discussed more fully below, defendant's unitary course of conduct purportedly to obtain default judgments in a fraudulent manner, presents common questions of law and fact that can be resolved most efficiently on a class basis. Now that goes to your point that that was for class certification. But as to the other point, it says the record before the court establishes that, so --

THE COURT: Well look. You can try to parse the language, but the fact of the matter is, is that when a court is deciding whether or not something proceeds as a class, the court doesn't make findings that are binding.

That would be ridiculous. There would be no need for a trial. The case would be over.

MR. KESHAVARZ: I mean, if --

THE COURT: Regardless of what Judge Chin may have used in his language, it cannot be that he determined that the class allegations had been established. Because then he would've found not only that the class was appropriate, but that the plaintiff had established that there was liability. If there was liability, there's no need to settle the case. The defendants just get to pay up. I mean, this is the way class actions work.

MR. KESHAVARZ: I agree with that, but I'm not saying that the defendants are precluded or bound by a finding. I'm not trying to suggest that. What I'm trying to suggest is that there was evidence that was presented in the pleadings that led to the class certification ruling. But my point is that I have to show by a preponderance of the evidence that certain things happened. And if he's saying the pleadings show that, that's evidence that I could use without going through discovery.

THE COURT: Okay. Well again, I read that only to be he stated what was in the pleadings that he was relying on, and that was there were clearly numerous instances in which this had happened. He talked about the

affidavits. That is the information that he needs to determine whether or not it needs to proceed as a class. What you're saying is that there's some other information, other than what he specifically cited, that's lurking in the pleadings or in the discovery. That's not really an appropriate inference to draw. Because if you're a Court, you're going to talk about the information that you're relying on that establishes the appropriateness of class treatment.

And so what it says is you look at what he says is in the record and he says -- and then he cites the things that are important to his decision. That doesn't tell me that there's other stuff there that proves something beyond the numerosity or the commonality.

MR. KESHAVARZ: Apparently, there is information that was in the Egleson -- that the Egleson affirmation summarized, that was in the motion. I don't know since it's all sealed, but I believe that it's not just an allegation in the complaint. I believe there was some factual support. It wasn't a motion to dismiss, it was class certification. So I believe there was some evidence that was attached to the pleadings that I would like to see. And the only cost for that is just for them to put it on a CD ROM since there is a protective order in place

here. There's no burden to them to do it.

THE COURT: First of all, I don't know what the protective order says.

MR. KESHAVARZ: It's they're agreed to the language.

THE COURT: No, but I mean why would -- are you saying -- I understand what you're asking is that a court in another action orders something to be produced under a protective order in a separate case.

MR. KESHAVARZ: Yes.

THE COURT: On what theory.

MR. KESHAVARZ: Well the theory is these are the parties to that case and they has possession, custody and control of the pleadings. And if they're ordered to produce that in this -- by this court, that they would have to comply with that order. And the harm is none, from my point of view, because we have a protective order in this case, the language of which they've agreed to. So that information is still entirely confidential.

THE COURT: Okay. Again, I will only say I have ruled on the application before me.

MR. KESHAVARZ: Thank you, Your Honor.

THE COURT: Okay. And I will set a discovery cutoff of February 28th, which is near the end of February,

right?

MR. LICHTMAN: Yes, thank you, Your Honor.

THE COURT: Okay. Again I do have this for discovery disputes. That means other disputes may come up. I will rule on the disputes that come to me. I'm not going to set any interim conferences. Here's the way you're going to deal with this.

If you have disputes, tee them up. Send me a joint letter with what the dispute is with each party's position. If you cannot get the other side to sit down and do the joint letter with you, then document your attempts to get them to reply, and then submit a letter on your own. This is to prevent somebody from just being unavailable and not letting something be decided. And then we'll appropriately call that person on the carpet.

If there's nothing further, you may proceed as is your right with respect to the going forward.

MR. BALBER: Thank you, Your Honor.

THE COURT: We are adjourned.

(Whereupon the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the case of Guzman v. Mel S. Harris, Docket #16cv03499, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature_____

Date: November 16, 2016